

BUSINESS LAW SECTION

CORPORATIONS COMMITTEE

COMMITTEE MEETING MINUTES FOR JANUARY 4, 2002

**Friday, January 4, 2002
By Video Conference**

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held by video conference on January 4, 2002. Attendance was as follows:

MEMBERS PRESENT:

Keith Paul Bishop
David S. Caplan
John C. Carpenter
Nelson D. Crandall
Bruce Dravis
James K. Dyer, Jr.
Teri Shugart Erickson
James F. Fotenos
Mark T. Hiraide
Carol K. Lucas

Eileen Lyon
B. Keith Martin
Brian D. McAllister
Cynthia Ribas
Randall B. Schai
James R. Walther
Daniel J. Weiser
Neil J. Wertlieb
Nancy Wojtas

MEMBERS ABSENT:

Timothy J. Fitzpatrick
Steven K. Hazen
Ethna M. Piazza
David M. Pike

LIAISONS PRESENT:

Suzanne S. Graeser, Executive Committee
Hugh O'Boyle, Corporate Law Department

GUESTS PRESENT:

Brad Clark, Nonprofit Organizations Committee

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda which are not described in these Minutes. In David Pike's absence, Jim Dyer agreed to take the minutes of the meeting.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was called to order by Co-Chair Neil Wertlieb at approximately 9:30 a.m. Mr. Wertlieb reported that a portion of the recent report of the SEC concerning Regulation FD was included in the materials for this meeting. The remaining portion of the SEC report and the junction box materials (discussed by Steve Hazen at the prior meeting) were not included with the materials for the meeting, but would be made available by Mr. Wertlieb to any member of the Committee upon request. Co-Chair Jim Walther reported on the upcoming spring meeting of the American Bar Association scheduled in Boston, and that the ABA and the Business Law Section of the California Bar Association are working on listserves for their membership.

B. Minutes of December 7, 2001 Meeting. Keith Bishop, Teri Erickson and Dan Weiser commented on the draft minutes of the meeting of the Committee held on December 7, 2001.

Members of the Committee were asked to send any proposed revisions to the December 7 minutes to David Pike for revision and redistribution to the members for reconsideration and approval at the February 1 meeting.

C. Video Conferencing. The Committee agreed to hold the April 5, 2002 meeting by video conference and will consider holding the August 2, 2002 meeting by video conference.

II. LIAISONS' REPORTS AND DISCUSSIONS.

A. Department of Corporations. Jim Walther reported that he had spoken with Tim Le Bas, Assistant Commissioner and General Counsel, Office of Law and Legislation, before the meeting. Mr. Le Bas informed Mr. Walther that the Department of Corporations was in the process of hiring a lawyer to specialize in the area of small businesses, and that the Department had issued an opinion that may be of particular interest to the members of the Committee, Commissioner's Opinion 01/1C ("Opinion"), dated December 6, 2001. In the Opinion, which was enclosed with the materials distributed to the members prior to the meeting, the Commissioner opined that the corporation in question would not be engaged in the business of effecting transactions in securities (and, therefore, would not be a "broker-dealer" under Section 25004 of the California Corporations Code) as a result of its activities in connection with the sale of its securities between its shareholders and employees in California under the circumstances. Several of the members of the Committee voiced their approval of the Opinion and commended the Department for its work on this matter.

B. BLS Executive Committee. Suzanne Graeser presented the report of the Executive Committee of the Business Law Section. Ms. Graeser reported that she would share responsibility with Tim Hoxie as the Northern California liaison from the Executive Committee to the Corporations Committee. Ms. Graeser reminded the Committee that the Annual Spring Meeting of the Business Law Section would be held in San Diego on May 17-19 and encouraged everyone's attendance. Ms. Graeser also reported that the Opinions Task Force had voted to convert to a standing committee of the Business Law Section. Further, Ms. Graeser informed the Committee that the Opinions Task Force sent a questionnaire to a number of law firms and that over half of the law firms receiving the questionnaire indicated that they would like to participate in the process. In addition, Ms. Graeser reported that a broadcast email would be sent to the members of the Business Law Section in connection with the constituency project.

C. Corporate Law Department Committee. Hugh O'Boyle provided a brief overview of the recent events concerning the Corporate Law Department Committee, including an SEI presentation scheduled for January.

D. UCC Committee. Jim Dyer said that the UCC Committee met by video conference on January 3, 2002. The UCC Committee has formed a subcommittee to work with the Secretary of State in connection with its UCC automation project. The UCC Committee continues to closely monitor Article/Division 9 throughout the country following the recent effective date of Revised Article 9. In addition, the UCC Committee is close to finalizing Model Deposit Account Control Agreements for time and demand deposit accounts and discussed the possibility of publishing them in the ABA Business Lawyer and the California Business Law News when completed.

E. Nonprofits Committee. Brad Clark reported that the Nonprofits Committee has not met since the last meeting of the Corporation's Committee at which he presented an update. Mr. Clark encouraged more interaction between the Nonprofits Committee and the Corporations Committee, particularly on legislative and regulatory matters affecting corporations and nonprofit entities.

III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Report of Legislative Liaison. Jim Fotenos reported that the California legislature was not currently in session, but would return on Monday, January 7, 2002. Mr. Fotenos had recently

spoken with Terry Miller, who informed Mr. Fotenos that a few legislative proposals had been received, including a proposal from the Los Angeles County Bar Association relative to short form dissolutions (similar to that contained in Section 274 of the General Corporation Law of the State of Delaware). Sponsors are being sought for legislative proposals relating to Sections 701 and 25118 of the Corporations Code. Mr. Fotenos reminded the Committee that the deadline for the submission of bills to be considered this session is February 22, 2002.

B. SB 399--Corporate Conversions. Neil Wertlieb said that Larry Doyle and Terry Miller are discussing the contemplated corporate conversion legislation with legislative staff and are awaiting input.

C. Section 25102(o) Emergency Regulations Comments. Suzanne Graeser reported that she had recently discussed the 25102(o) emergency regulations with Tim Le Bas. The regulations are currently in effect, but the Department of Corporations plans to republish them for public comment. Mr. Le Bas encouraged the Committee to provide comments, including practical issues that have been encountered.

IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Secretary of State Fax Filings. Bruce Dravis informed the Committee that he had recently discussed the potential of fax filings with Kathy Mitchell, Chief, Business Programs Division, California Secretary of State. As a result of the conversation, Mr. Dravis will compile all prior correspondence between the Committee and the Secretary of State's office concerning this issue and forward it to Ms. Mitchell. The Committee briefly discussed the issue of whether legislative action would be required to permit facsimile filings and the impact, if any, recent federal legislation concerning electronic communications could have on the matter. Teri Erickson noted that many political filings are required to be made electronically. Next, the Committee discussed the possibility of combining this project with the electronic communications project and decided against it.

B. 25118(b) (definition of aggregate evidences of indebtedness). Dan Weiser reported that there were no significant developments on this matter.

C. Amend Corporations Code to Permit Electronic Communications to Constitute a "Writing". Brian McAllister said that the working group would have a draft proposal for the next meeting. After surveying approximately eight states, corporate legislation specifically permitting electronic communications to constitute a "writing" would be novel (with the exception of Delaware). Jim Walther suggested that the working group also review Maryland law in this regard.

D. Amend Finance Lenders Law. Keith Bishop summarized the draft proposal that was included in the materials distributed to members of the Committee in advance of the meeting. A lengthy discussion followed concerning, among other things, the importance of the venture capital industry to the State of California, the potentially broad application of the existing law well beyond the original intentions of the legislature, the potentially adverse and unintentional consequences of its application, the complexity and extensive disclosure requirements of the required application, and the significant time and costs associated with the regulatory application process. Jim Walther and Jim Fotenos agreed to work with Mr. Bishop to revise the legislative proposal to address the original legislative intent of the statute and to articulate the reasons why the regulation of venture capital companies as finance lenders was not originally contemplated and is not necessary or appropriate in light of that original legislative intent.

E. Conflict Between Section 25100 and Nasdaq NMS Minimum Bid Requirements; Technical Corrections Relative to Nasdaq NMS Conversion to an "Exchange" under Exchange Act. The conversion of the Nasdaq NMS to an exchange and the corresponding need to update the Corporations Code was discussed by Keith Bishop and Brian McAllister. The Committee decided to combine these two projects into one. Keith Bishop and Brian McAllister will work together on a technical corrections bill to address these matters.

V. WEB SITE PROJECTS.

David Caplan provided an update on the current state of the web site, noting that changes have been made. Mr. Caplan is working on posting law firm communications and advisories on the web site and developing an internal listserve. Mr. Walther suggested that the Commissioner's Opinion 01/1C be posted to the web site under current events.

VI. OTHER PROJECTS.

A. Opinion Project. Nelson Crandall provided an overview of the status of the opinions project. Mr. Crandall discussed the objectives of the opinions project and reminded the Committee that the report is to be written in an objective manner based upon customary practice. The five primary areas to be covered in the report are: (i) the reason for obtaining a particular opinion, (ii) the benefits derived from receiving the opinion, (iii) commonly accepted language for the opinion, (iv) the due diligence customarily performed to render the opinion, and (v) the assumptions, qualifications and limitations of the opinion. Mr. Crandall reported that Nancy Wojtas has agreed to transfer to the remedies group and to serve on the Opinion Task Force as a liaison between the two groups.

The role of the opinions project in light of the Opinion Task Force's decision to convert to a standing committee was discussed in detail. Mr. Crandall stated that it is not anticipated that the new committee will be actively involved in the initial drafting of the report, and that neither the nature nor the scope of the opinions project of the Committee will be significantly changed as a result of the conversion. Suzanne Graeser reported that John Powers will be the Chair of the Opinions Committee and that he is in the process of drafting a memorandum that will describe the new committee's mission. It is anticipated that the primary focus of the Opinions Committee will be the remedies portion and that the new committee will monitor developments in this area on a national level. Co-Chairs Walther and Wertlieb emphasized that the Committee will play an active role and that the opinions project is one of the Committee's top priorities for this term.

Next, at the request of Mr. Crandall, each working group chair in attendance provided a brief update on his or her working group's activities to date. Mr. Crandall then discussed the estimated timetable for the opinions project. Drafts for review by the committee of chairs are due within six months of the commencement of the project a month ago. Mr. Crandall expected that each working group would have at least three drafts of its portion before final submission for review by the chairs. Mr. Crandall recommended that the first working group drafts be circulated among the members of each working group within six to eight weeks.

Carol Lucas reported that the copyright assignment to be signed by each member of the Committee had been revised based upon the discussions of the previous meeting of the Committee. The revised copyright assignment will be distributed to the members of the Committee by Neil Wertlieb. Ms. Lucas also informed the Committee that each member's law firm is not required to sign the copyright assignments unless there are unusual provisions in the firm's employment, partnership or other agreements. Ms. Lucas advised each member to consider whether his or her law firm's consent is required under such agreements.

B. Educational Activities. Bruce Dravis reported that the Committee is in need of a topic for the Annual Spring Meeting of the Business Law Section. The Committee noted that the Annual Spring Meeting is intended to be more advanced than the Annual Meeting of the California State Bar. The Committee discussed various options and decided that the topic would be a comparison of California and Delaware business law, including matters pertaining to tax, securities, and the applicability of California Corporations Code Section 2115. Members of the Partnerships and LLCs Committee may be asked to participate on the panel. The Committee also considered updating an article on this topic that had been written several years ago for the California Business Law News for republication as revised.

C. Guide to Organizing a California Corporation. Eileen Lyon reported that the working group

had met a few weeks prior to the meeting and that she anticipates that a draft will be distributed for review by the members of the Committee at the February meeting. The working group does not plan to eliminate as many portions of the original guide as was previously contemplated.

D. Blue Sky Guide. Keith Bishop reported that he has completed his review of the Blue Sky Guide and that publication is scheduled for the first half of 2002.

E. 25102(f) Regulations. Jim Walther reported that he had been advised by Mr. Le Bas that the Department of Corporations believes that the actions contemplated by the proposed 25102(f) regulations regarding the reasonable belief standard require legislative action and must be done by statute.

F. Investment Advisor Exemption. Keith Bishop reported that investment advisor regulations may be published by the Department of Corporations for 15-day comment during January and may be effective next month.

G. Fiduciary Duties of Directors. Dan Weiser reported that there had not been much progress since the last meeting and expects to have a more detailed report at the next meeting of the Committee.

H. Federal Securities Law and Regulatory Proposals. The Committee discussed its perceived role in connection with federal securities laws and regulations. Given its importance to California business law practitioners, the Committee decided to maintain this item on the agenda and to monitor developments in federal securities laws and regulations and respond on a case-by-case basis as deemed appropriate by the Committee. Mark Hiraide and Dan Weiser will be primarily responsible for monitoring developments in this area and submitting them to the Committee for consideration. Suzanne Graeser will confirm with the Executive Committee that such activities are considered consistent with the Committee's mission and within its powers.

VII. NEW BUSINESS.

A. Commodities Futures Modernization Act of 2000. Keith Bishop summarized his letter to Commissioner Boutris, dated December 10, 2001, regarding the Commodities Futures Modernization Act of 2000, and emphasized the need for legislation.

The meeting was adjourned at approximately 12:30 p.m.

James K. Dyer, Jr.

Corporation Committee Meeting Minutes

